(5)

No. 10-330

JUN 6 - 2011

In The
Supreme Court of the United States

EDMUND G. BROWN,
Governor of California, State of California, et al.,

Petitioners,

v.

RINCON BAND OF LUISENO MISSION INDIANS of the Rincon Reservation, aka RINCON SAN LUISENO BAND OF MISSION INDIANS, aka RINCON BAND OF LUISENO INDIANS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF OF PETITIONERS IN RESPONSE TO THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The Indian Gaming Regulatory Act of 1988 ("IGRA") compels federally recognized Indian tribes to enter into compacts with states to set the terms by which tribes may conduct casino-style gaming on their Indian lands. IGRA's compact requirement did not abrogate Indian tribes' immunity to State taxation, and provides that a state's demand for direct taxation in compact negotiations is evidence of bad faith. This petition for a writ of certiorari presents the following questions:

1. Whether a state demands direct taxation of a tribe in compact negotiations under Section 11 of the Indian Gaming Regulatory Act, when it bargains for a share of tribal gaming revenue for the State's general fund.

2. Whether the court below exceeded its jurisdiction to determine the State's good faith in compact negotiations under Section 11 of the Indian Gaming Regulatory Act, when it weighed the relative value of concessions offered by the parties in those negotiations.

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This brief is in response to the brief for the United States as *Amicus Curiae*, filed in this case at the invitation of the Court, and dated May 2011.

DISCUSSION

The United States' brief as *Amicus Curiae* underscores the urgent need for this Court to grant the petition for a writ of certiorari in order to restore the uniform application of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*, and to preserve the sovereign authority of Indian tribes and states to engage in tribal-state gaming compact negotiations without unwarranted federal entanglement.

A. The United States' View Of Compact Negotiations Would Eliminate The Notions Of Cooperative Federalism That Animate IGRA's Compact Requirement

The State does not dispute the United States' contention that the principal purpose of IGRA is to advance tribal interests in economic development. § 2702.[1] However, sharing gaming revenue with the State that has provided exclusive casino gaming rights in the Nation's most lucrative gaming market is not inimical to tribal interests. In *Artichoke Joe's v. Norton*, 353 F.3d 712, 715 (9th Cir. 2003), the Ninth

[1] All citations are to Title 25 of the United States Code, unless otherwise indicated.

Circuit Court of Appeals characterized IGRA as an example of "cooperative federalism," which seeks to balance the sovereign interests of the federal government, state governments, and Indian tribes. In recent years, the State, and a number of California tribes that agreed to share gaming revenues, took this notion to heart in the belief that general fund revenue sharing would form the political foundation for a long-term, stable gaming relationship. App., 56, 106, n. 19. Under this approach, tribes would remain the primary beneficiaries of casino gaming in California, but non-tribal citizens would also derive some benefit in the form of revenue to the general fund. This, it was hoped, would maintain political support for tribal gaming exclusivity and forestall efforts to amend the California Constitution to expand casino gaming to non-tribal operators. The loss of exclusivity would place mostly remote tribal casinos at a significant competitive disadvantage, likely driving many out of business.

The court of appeals' decision would end this partnership, and the United States apparently sees no reason to preserve it. Although the Senate Report to IGRA identifies the State's governmental interests in compact negotiations as "including its economic interest in raising revenue for its citizens," S. Rep. No. 446, 100th Cong., 2d Sess. 13 (1988), the United States denies the relevance of the State's own economic interests, and concludes that "[n]othing in the text of IGRA supports the State's contention that a broad interest in generating revenue for the State is a purpose of the statute." U.S. Amicus, 13-14. Under

this view, the State will be compelled to enter negotiations in which it has little prospect of achieving meaningful benefit. Such negotiations will provide a weak foundation for productive tribal-state relations.

The United States contends this case is fact bound, with limited potential impact beyond the negotiations involving the Rincon Band and the State of California (U.S. Amicus, 10), the reality is very different. A number of California Indian tribal representatives have informed the Governor's Office[2] that they interpret the court of appeals' decision, and the construction given it by the Secretary of the Department of the Interior, to establish that California has nothing left to negotiate, and so has no prospect of obtaining meaningful concessions from tribes seeking either their first gaming compact, or enhancements to gaming rights in existing compacts. The State anticipates that if the court of appeals decision is not reversed, numerous tribes will seek to amend their gaming compacts to enhance their gaming rights, and eliminate general fund revenue sharing where it exists. Indeed, three tribes have explicitly represented such an intention. It would be naïve to believe others will not follow.

The decision below is particularly significant as California anticipates compact renegotiations with

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[2] The California Constitution establishes that the Governor of California is responsible for conducting tribal-state gaming compact negotiations under IGRA. Cal. Const., art. IV, § 19, subd (f).

potentially dozens of tribes. The court of appeals and the United States both viewed the State's "negotiating tactics" in this case as particularly oppressive due to the "plain fact" that tribes and states do not enter compact negotiations "voluntarily," because "the tribe may not engage in gaming without a compact." Pet. App., 22-23; U.S. Amicus, 16. This notion is derived from IGRA's Senate Report, where it is explained that the good faith negotiation requirement was imposed on states alone to balance IGRA's allocation of bargaining power, under which tribes would need a compact to conduct casino-style gaming, but states might be disinterested in bargaining. S. Rep. No. 446, *supra*, at 13-15. In this case, however, when the Respondent Rincon Band sought compact renegotiations with the State, it already had a compact under which it operated 1,600 slot machines (App , 8), and which compact even the court of appeals described as conferring "a valuable economic right . . . in exchange for a program under which all of the significant benefits" were enjoyed by the Rincon Band. Judge Bybee described the compact as "the Band's sweetheart deal." App., 119 (Bybee, J., dissenting). Accordingly, the suggestion that the Rincon Band's entry into the 2004 compact renegotiations was involuntary, is simply false. Yet, this falsehood will infect all future compact renegotiations in California if the court of appeals' decision is allowed to stand.

Accordingly, the court of appeals' decision places in jeopardy $364 million in annual general fund revenue estimated to be received from California tribes

under compacts negotiated since 2004.[3] This is a particularly significant concern at a time "when the State of California is facing an unprecedented budgetary shortfall." *Brown v. Plata*, ___ U.S. ___, slip op. at 32 (2011). If the court of appeals' decision is upheld, IGRA's compacting process will be severely undermined by ensuring that one party to the negotiations has little incentive to engage.

Even accepting the United States' view that this case's impact is limited to California, the Court should still grant the petition because California is home to 108 Indian tribes, each of which has an interest in maintaining a stable gaming environment in California that the court of appeals' erroneous ruling unsettles. Because there is no prospect of another case affording an opportunity to review the issues presented by the petition before the State enters another round of tribal-state compact negotiations, the Court should grant the petition.

B. The Court Of Appeals' Decision Has Adversely Impacted The Secretary Of The Interior's Review Of Negotiated Compacts, To The Detriment Of Tribes And The State

The United States characterizes as "unfounded" the State's concern that the court of appeals decision

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[3] See California Budget Summary, Revenue Estimates, pp. 62-63 (available at the URL http://www.ebudget.ca.gov/pdf/BudgetSummary/RevenueEstimates.pdf).

has resulted in erroneous decision making by the Interior Secretary. U.S. Amicus, 18. In addition to the Secretarial decisions discussed in the Petition (Pet. 29-31), the recent Secretarial disapproval of the negotiated compact between the State of California and the Pinoleville Pomo Nation underscores that this concern has substantial merit. The Pinoleville compact, first submitted to the Secretary on February 11, 2010, would authorize the Pinoleville Tribe to operate up to 900 slot machines, and contribute a fifteen percent revenue share to the State's general fund in exchange. After acknowledging that the court of appeals' decision formed an "important part" of his analysis, the Secretary found:

> that the exclusivity provided by Proposition 1A constitutes a meaningful concession but . . . it does not confer a substantial economic benefit on the Tribe sufficient to justify 15-percent revenue sharing.

Echo Hawk-Williams Letter, Feb. 25, 2011, pp. 2-3. This statement seems to be very much at odds with the court of appeals' reasoning that the State could no longer contend that the exclusivity provided by Proposition 1A is a meaningful concession in compact negotiations. In the end, the result is the same because the Secretary concluded that Proposition 1A was not meaningful enough.

Yet the concern that lingers after the recent secretarial disapprovals of California compacts is that states seeking to justify negotiated general fund revenue sharing provisions in gaming compacts now

face a gauntlet of at least three subjective standards that are found nowhere in the text of IGRA: whether a "meaningful concession" has been offered (App., 36-48); whether the meaningful concession offers a "substantial economic benefit" (Echo Hawk-Williams Letter, p. 3); and whether the "relative values of concessions offered [were] greatly disproportionate" (U S. Amicus, 15). Unless the court of appeals' decision is reversed, these subjective standards will appear either in federal litigation over a state's good faith under § 2710(d)(7), or in the Secretary's review of negotiated compacts under § 2710(d)(8). In either circumstance, the application of such standards will subvert the sovereign negotiations Congress envisioned. 25 U.S.C. § 2710(d)(3).

C. The United States' Application Of IGRA To Revenue Sharing Is Not Uniform, Is Unworkable, And Is Unrooted In IGRA.

In an effort to downplay the national importance of this case, the United States asserts that the court of appeals' decision is only applicable in California, the nation's largest gaming market, and is therefore fact bound and intertwined with the construction of California's Constitution:

> No other State has a constitutional provision granting tribal gaming exclusivity, thereby divesting the State of leverage it might otherwise have to request revenue sharing in class III gaming compacts. The court of appeals' decision therefore will not affect the ability of

> other States to offer some form of exclusivity in exchange for revenue sharing with a tribe. . . .
>
> * * *
>
> California, alone among the States, would have to offer tribes something other than exclusivity if it wanted to obtain a share of tribal gaming revenue to be paid into the State's general fund as a condition of expanded gaming operations.

U.S. Amicus, 17, 21. It is true that buried in this case are questions of state law the court of appeals refused to certify to the California Supreme Court, and then decided in error (see Pet. Reply, 2-6, and accompanying notes). However, these issues need not be reached on the questions presented by the Petition.

The United States' acknowledgement that California is alone among states offering exclusive tribal gaming rights to be barred from seeking general fund revenue sharing is noteworthy because it shows IGRA is not uniformly applied among similarly-situated states. However, the assertion that the case is fact bound, and so unworthy of review (U.S. Amicus, 17), misses the point of the first question on which review should be granted: whether negotiations for a general fund share of tribal gaming revenue constitute a demand for direct taxation. If such negotiations do not constitute a demand for direct taxation, the court of appeals' subjective inquiry into the nature of "meaningful concessions" need not be reached.

Additionally, the United States' conception of what constitutes a "demand for direct taxation" within the meaning of § 2710(d)(7)(B)(iii)(II) has no basis in the text of IGRA, and is unworkable in practice. According to the United States, whether a state demands direct taxation (which IGRA deems evidence of a lack of good faith) is determined by looking at what is offered in exchange, and assessing whether it is "meaningful." U.S. Amicus, 14. Under this view, the phrase "demand for direct taxation" in § 2710(d)(7)(B)(iii)(II) has no statutory meaning independent of the subjective views of the negotiating tribe, a court adjudicating a state's good faith, or the Secretary exercising his compact approval authority. This construction of IGRA leaves the State in an impossible negotiating posture, under which its good faith is measured not by its own intentions and actions, but by how they are received. This further illustrates why it is important for this Court to establish an objective understanding of when a demand for direct taxation is made.

The resolution of this issue is of urgent national importance. States must know whether their negotiations for revenue sharing will embroil them in the subjective, fact based inquiry the court of appeals' decision would demand in litigation over a State's good faith, and the Interior Secretary is applying to the compact approval process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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